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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 478

ARNOLD ROMANO and DOMINICK ROMANO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

MONROE H. FREEDMAN
RALPH J. TEMPLE
Freedman & Temple
1641 Madison Street, N.W.
Washington, D.C. 20011
Attorneys for Petitioners

September 4, 1970

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The Government's opposition to the petition for certiorari fails to meet the issues raised in the Petition for Certiorari.

1. *The "all or nothing" instruction in conspiracy trials.* The Government states that there was evidence "from which the jury could reasonably conclude that petitioners were part of a single conspiracy . . . ." But that does not meet the point, which is that the jury could equally have

concluded that there were two conspiracies—if it had been given the choice. The vice of the all or nothing charge is that it unfairly restricts the jury's options, requiring it to convict all defendants in order to convict any.

2. *Denial of the right to counsel.* The Government argues that the attorney, Markowitz, who was forced on petitioner Arnold Romano over his express objections, had previously represented him. But Markowitz was discharged specifically because Romano was dissatisfied with the prior representation. The cases cited at p. 14, note 20 of the Petition establish the principle emerging from all Federal decisions on the point, but never articulated by this Court—that an undesired attorney may not be forced on a defendant who is diligent in securing counsel of his choice.[1] To those cases should be added *Brown v. Craven*, 424 F.2d 1167 (1970), in which the United States Court of Appeals for the Fifth Circuit said:

> "[T]o compel one charged with grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever." (424 F.2d at 1170)

3. *Denial of a speedy trial.* The Government contends that this is not an appropriate case for review because "a large portion of the delay" was attributable to Arnold Romano's fugitivity. But the delay at issue is the two years *subsequent* to Romano's capture, during which time he was continually in federal custody.

Moreover, the Solicitor General has indeed endorsed Romano's position that a defendant need not make a formal "demand" of a speedy trial, but need only make

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[1] Petitioner, who was in prison, did not have "three days" notice that his attorney would not be available. The attorney himself did not learn of his inability to appear until the Friday afternoon before the Monday morning of the trial.

a "request" that is sufficient to put the Government "on notice" of his desire. The Solicitor General wrote:[2]

> ". . . If the government, *having been put on notice by this request*, refuses to comply, then the foundation for a claim of violation of the right to a speedy trial has been laid." (Emphasis added)

Yet the court below held that Romano waived a speedy trial because his requests failed to meet the requirements of a formal demand.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

MONROE H. FREEDMAN
RALPH J. TEMPLE
Freedman & Temple
1641 Madison Street, N.W.
Washington, D.C. 20011
Attorneys for Petitioners

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[2] *Maxwell v. United States*, No. 750 Misc., Oct. Term, 1967, Brief in Opposition to the Petition for Certiorari, p. 3.